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No. 89-1693

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN E. NORTON,

Petitioner,

v.

PAUL C. NICHOLSON, FRANK G. BENAK,
LOIS J. FLEMING, and
THE VILLAGE OF WESTERN SPRINGS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT

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RESPONDENTS' BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

I. STATEMENT OF THE CASE

A. Preliminary Statement

Petitioner, John E. Norton, in his petition for a writ of certiorari, includes a statement containing what he contends to be the material facts of the present case. United States Supreme Court Rule 15.1 obligates respondents to point out any perceived misstatements of fact made by the petitioner. Mr. Norton's statement of the case goes well beyond what is contained in the record. Respondents take issue with the argumentative and conclusory manner in which he characterizes the facts, as well as his frequent failure to cite to the record in support of his factual interpretations. Rather than attempting the cumbersome task of detailing each of the petitioner's misstatements of fact, however, respondents provide their own statement of the material facts.

B. Statement of Facts

Petitioner filed his initial complaint against the Village of Western Springs' Village Manager, its Fire Chief and its Director of Personnel on September 18, 1984. (R.2-5.) The complaint stated that Mr. Norton was a part-time fireman in Western Springs who prepared a July 2, 1984, memorandum addressed to the Western Springs Fire Department "Chain of Command." The memorandum, which Mr. Norton distributed to four lieutenants in the Department, criticized a change in fire fighting procedure and noted that Mr. Norton had attempted to bring the subject to the Fire Chief's attention. Mr. Norton's memorandum, the text of which is reprinted in full on pages 8-10 of his petition, ended by stating:

> I tried to clarify some of this with the Fire Chief, but he 'made a face' and walked away from me without a word. I can only guess that he couldn't answer

> unless it went through the 'chain of command.'

The complaint stated that, as a result of his having written the memorandum, Mr. Norton was fired. (R.2-6.)

Under the Village's appeal procedure, Mr. Norton sought and was given a hearing. (R.409-411.) At the hearing, he submitted both oral presentations and written documents. One of the documents, a memorandum written by Mr. Norton and dated July 26, 1984, related to past discussions with the Fire Chief on procedural and operational matters. That memorandum, which outlined more than 20 previous "verbal criticisms" of the Fire Chief, stated that Mr. Norton's criticisms had gone on for two years. Moreover, the memo indicated that in some of the cited instances, "raised voices and harsh words were generated by both of us and witnessed by others." (App., pp. 6a-7a.)

After the hearing and a review of the

written documentation submitted by Mr. Norton, the Village Manager reduced the discipline from termination to suspension without pay for 30 days. (R.409-411.) The Village Manager's findings, set forth in a three-page letter dated August 16, 1984, cited the reasons for Norton's termination and stated that the memorandum constituted a violation of the Village Personnel Manual and the Fire Department Rules and Regulations. (R. 409-411.)

Before the defendants filed a pleading in response to the administrative review complaint, Mr. Norton wrote a second memo, dated January 7, 1985, addressed to the Assistant Fire Chief, which criticized a proposed change in the use of some recently purchased equipment. (R.428-430.) The memo stated that the proposed change was from an earlier policy agreed on between plaintiff, the defendant Fire Chief and the Assistant Fire Chief.

Mr. Norton claimed, in the memo, that the change from the agreed-on policy was wrong, writing that "I guess I was just totally 'suckered' into an insincere ploy and became a party to deceitful communication." He also wrote that one way of looking at the proposed change is that:

> Either - All three of us on the committee were really stupid, ill-advised and naive;
>
> or
>
> We are guilty of willful deceit and connivance;
>
> or
>
> Someone has an extremely short memory.

(R.429.)

On January 31, 1985, the defendant Fire Chief wrote Mr. Norton a letter terminating his position as a part-time firefighter. (R.436.) Plaintiff requested an appeal (R.438) which resulted in the Village Manager reviewing the facts

and making a finding that the termination was justified because the antagonistic tone of the memorandum violated the Village Personnel Code. (R.440-441.)

After his dismissal, Mr. Norton amended his complaint to seek review of the firing as well as review of the earlier discipline occasioned by the original memorandum. (R.15-24.) The amended complaint was stricken by the trial judge (R.37), as was the subsequently filed second amended complaint (R.65), and the case was dismissed. (R.73.) The court, however, later vacated the dismissal and allowed Mr. Norton to file his eight-count, three-volume third amended complaint. (R.457.) That too was dismissed, pursuant to the defendants' motion, and the trial court denied Mr. Norton leave to file a fourth amended complaint. (R.663.)

The Illinois Appellate Court, First District, found that the appropriate

method of review of municipal administrative agency decisions is by way of a common law writ of certiorari because such cases do not fall under the ambit of the Illinois Administrative Review Act (Ill. Rev. Stat. ch. 110, ¶¶ 3-101 et. seq. (1987)). Thus, the appellate court treated the case as though the trial court had granted certiorari and reviewed the lengthy record. In its opinion (Norton v. Nicholson, 187 Ill. App. 3d 1046, 543 N.E.2d 1053 (1st Dist. 1989)), the court concluded that the discipline imposed by the Village in response to both of Mr. Norton's memoranda was supported by the evidence. (App., pp. 1a-17a.) It proceeded to review the third and proposed fourth amended complaints to determine if plaintiff had stated a cause of action for damages based on violations of his rights to free speech, in writing and circulating the memoranda, and due process in the way

in which the discipline was effected. It concluded that plaintiff failed to assert a claim. (App., pp. 12a-17a.)

On November 1, 1989, Mr. Norton filed a petition for leave to appeal to the Supreme Court of Illinois. On January 31, 1990, his petition was denied.

II. SUMMARY OF ARGUMENT

Mr. Norton claims that he was disciplined and ultimately fired for having written two memoranda which were distributed to his superiors within the Western Springs Fire Department. The essence of his claim is that the subject matter of his memoranda touched upon a matter of public concern, and that the sanctions imposed upon him by the Village constituted violations of his right to free speech. The Illinois Appellate Court, however, properly viewed the suspension and firing as appropriate

discipline imposed upon a disruptive employee whose speech was, at best, of very limited First Amendment interest.

Mr. Norton now asks this Court to grant his writ of certiorari, claiming first, that the Court is obligated to review this case because it involves free speech issues, and second, that the appellate court's decision is in conflict with certain principles of law enunciated by the Supreme Court and other federal appellate courts. As to his first point, respondents submit that the mere fact that a free speech claim has been asserted does not, without more, present the type of "special and important" reason required by this Court's rules for granting certiorari. With regard to Mr. Norton's second contention, respondents submit that the appellate court's opinion aptly demonstrates that the proper principles were in fact applied, and that the

decision is in harmony with federal case law.

In cases, like the present one, involving free speech claims by public employees, two tests should be applied by reviewing courts. The first test involves an examination of the content, form and context of the employee's speech in order to determine whether the speech addresses an issue of "public concern." The second test involves an examination of numerous factors, including the time, place and manner of the speech, in an effort to "balance" the employer's interest in providing efficient public services against the employee's interest in protected speech. The Illinois Appellate Court, after engaging itself in a lengthy analysis of the record facts, applied both of these tests and affirmed the discipline imposed against the petitioner.

The appellate court first concluded that Mr. Norton's memoranda were more

accurately characterized as merely employee grievances over internal operations, rather than matters of public concern. This was because the memos had been written in the context of a two-year history of carping criticisms directed at the Fire Chief by petitioner, and the topic of each memo, like Norton's previous criticisms, involved nothing more than complaints about internal fire department procedures. Secondly, the appellate court determined that the sarcastic and pointed nature of the petitioner's criticisms of the Fire Chief, combined with the need for close working relationships among co-workers in this small suburban fire department, tipped the balance in favor of the Village's interest in providing efficient public services.

The Illinois Appellate Court thus applied the appropriate tests to the facts of Mr. Norton's case and reasonably

concluded that he failed to state a claim for violation of his right to free speech. Review by this Court is therefore not warranted.

III. ARGUMENT

Mr. Norton essentially states two reasons for granting certiorari in this case. First, he argues that this Court has an obligation to grant certiorari in cases involving free speech claims by public employees. Second, he contends that the lower court's decision is in conflict with decisions by this Court and other federal courts of appeals.

A. Certiorari Review By This Court Is Not Warranted Simply Because A Free Speech Claim Has Been Made.

Mr. Norton begins his argument by claiming that this Court has an obligation to conduct a certiorari review in

virtually all public employee free speech cases in order to continue to stress and clarify the standards to be used by lower courts in reviewing such cases. (Pet. for Cert., pp. 17-19.) Mr. Norton contends that the present case should be reviewed by this Court, if for no other reason, so that other courts may again be guided, cautioned and admonished regarding the rights of free speech by public employees. While respondents appreciate the importance of constitutional rights such as free speech, it is respectfully submitted that this Court could not conceivably act as a reviewing body for every imaginable set of litigated circumstances simply because a free speech issue is presented. Absent some special and important reasons for granting Mr. Norton's petition, this Court should not do so. (Sup. Ct. R. 10.1.) The petition presents no such reasons.

B. The Illinois Appellate Court's Decision Is Consistent With Relevant Decisions Of This Court And Other Federal Appellate Courts.

Petitioner also claims that certiorari should be granted because the Illinois Appellate Court supposedly decided the issues in this case in a manner which conflicts with applicable decisions of this Court and other federal courts of appeals. (Pet. for Cert., pp. 19-31.) Mr. Norton does not, however, cite any decisions in direct conflict with the Illinois Appellate Court's opinion. Instead he attempts to demonstrate a more general failure by the court to faithfully adhere to the principles enunciated by federal appellate courts in the context of free speech claims by public employees. The remainder of this argument will be devoted to discussing this contention.

1. The Applicable Standards And Tests

Mr. Norton cites Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986), for the proposition that courts reviewing First Amendment claims by public employees must apply three specific tests to the facts of such cases. The Ferrara case involved a teacher's claim that he had been terminated for speaking out against the practice of allowing high school students to select their own classes. The court determined that Ferrara's speech did not involve a matter of public concern, but rather a matter of internal school policy. Ferrara, 781 F.2d at 1516.

The steps required by Ferrara, according to petitioner, include: (1) an analysis as to whether the public employee's speech addresses an issue of "public concern," as defined in Connick v. Meyers, 461 U.S. 138, 103 S. Ct. 1684 (1983); (2) a determination as to whether

the employee's speech was the "prime motivating factor" in the imposition of discipline, as explained in Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S. Ct. 568 (1977); and, (3) a balancing of the employer's interest in providing efficient public services against the employee's interest in protected speech, as provided by Pickering v. Board of Ed. of Township High School Dist. 205, 391 U.S. 563, 88 S. Ct. 1731 (1968). If any one of the foregoing tests results in a finding adverse to the employee, his case must fail.

The second step, referred to by petitioner as the "Mt. Healthy" test, is not relevant to this proceeding. Whether an employee's speech was the prime motivating factor of his discipline involves questions of fact (Hall v. Ford, 856 F.2d 255, 258 (D.C. Cir. 1988)), and factual questions cannot properly be

disposed of upon a motion to dismiss. Peterson v. Yacktman, 25 Ill. App. 2d 208, 213, 166 N.E.2d 452, 455 (1st Dist. 1960); Fancil v. Q.S.E. Foods, Inc., 60 Ill. 2d 552, 554, 328 N.E.2d 538, 539 (1975). Since Mr. Norton alleged in his complaints that his memoranda were the cause of his discipline, the defendants were deemed to have admitted that fact for purposes of their motion to strike and dismiss. Thus, the Illinois Appellate Court properly declined to address that issue.

The first and third of the tests enumerated above, however, involve questions of law for the court to resolve. Hall, 856 F.2d at 258. Respondents thus agree that the so-called "public concern" inquiry set forth in Connick, and the "balancing test" set forth in Pickering, were properly before the appellate court in this case. Indeed, the Illinois Appellate Court applied each

of these tests to the facts of the present case and determined that Mr. Norton's memoranda were, at best, of only limited public concern, and that the Pickering balance tipped in favor of the Village's interest in providing efficient public services.

It is thus clear that the true nature of petitioner's dispute here is not whether the proper tests were applied, but whether they were properly applied to the facts of this case. The following discussion of the "public concern" inquiry and the "balancing" test supports the appellate court's opinion and demonstrates that the decision is in harmony with the relevant decisions by this Court and other federal courts of appeal.

a. The "Public Concern" Test

It is well-settled that a public employee does not give up his freedom of speech in return for a job. On the other

hand, when a public employee's expression cannot be fairly considered as relating to a matter of political, social or other public concern, his dismissal is usually not subject to judicial review, even if the reasons for the dismissal are alleged to be mistaken or unreasonable. Connick, 461 U.S. at 146.

Governmental employers have broad discretion in dealing with their employees' expressions of opinion on matters that affect only the internal workings of the agency. "[T]he First Amendment does not require a public office to be run as a round table for employee complaints over internal office affairs." 461 U.S. at 149. The employer need not "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." 461 U.S. at 152.

The question of whether an employee's speech addresses a matter of public concern should be determined by examining the content, form and context of a given statement, as revealed by the entire record. 461 U.S. at 136-137. The appellate court carefully examined the lengthy multi-volume record and devoted nine pages of its opinion to a detailed discussion of the facts. (App., pp. 4a-12a.) The content, form and context of Norton's speech clearly weighed heavily in the court's decision.

The context of petitioner's speech, for instance, was of special concern to the court. (App., pp. 15a-16a.) The court noted that the subject memoranda were written in the context of a two-year history of vocalized criticisms of the Fire Chief by Mr. Norton. By Norton's own admission, the past criticisms involved "raised voices and harsh words" between

the Fire Chief and Mr. Norton in the presence of others. Mr. Norton himself provided the Village Manager with a memorandum containing a veritable laundry list of past criticisms which he had personally communicated to the Fire Chief. (R.404-405.) That the petitioner's two memoranda were written in the context of a multitude of similar complaints and criticisms emphasizes the fact that the content of his speech is, as the court held, more accurately characterized as "merely employee grievances concerning internal operations." (App., p. 16a.)

The form of Mr. Norton's memoranda further emphasizes the internal nature of the speech. Mr. Norton admittedly followed the "grievance and complaint" procedure in routing his private memoranda through the Department "Chain of Command." The fact the petitioner chose a

private forum, rather than a public one, does not automatically remove his case from the umbrage of the First Amendment. Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 99 S. Ct. 693 (1979) (employee's speech concerning issues of desegregation and racial discrimination, which were obviously matters of great public concern, was protected even though the employee used a private forum). It does, however, indicate that Mr. Norton himself apparently believed that his speech involved an employee grievance.

Finally, the appellate court clearly felt that the content of Mr. Norton's memos was unworthy of being designated a matter of public concern. The memoranda contained sarcastic criticisms of specific changes by the Chief in the use of the Department's fire fighting equipment. Mr. Norton urges the Court to view his memoranda as involving matters of public

concern because they deal with the "comparative capabilities" and "response order of particular fire apparatus" which could reasonably be assumed to be of "benefit of the community." (Pet. for Cert., p. 23.) Despite Mr. Norton's efforts to aggrandize the topic of his speech by equating his memos with "whistleblowing activity," the bottom line is that his comments were merely two more in a long series of private criticisms of policies that affected the internal operations of the fire department. Consequently, the speech is, at best, of very limited First Amendment interest.

Mr. Norton argues that Bickel v. Burkhart, 632 F.2d 1251 (5th Cir. 1980) is a case on point and that it demonstrates that Norton's memos were of public import. The only similarity between Bickel and the present case, however, is the fact that both cases involved

communications between a fireman and a fire chief. Bickel's remarks, unlike Norton's, were not aimed at anyone, directly or indirectly; rather, his criticisms generally concerned the fire department as an institution and were not detailed criticisms of internal operational policies. Moreoever, the content of Bickel's speech was significantly different than Norton's. Bickel's speech was an isolated incident, and his comments were made at an open meeting in which a frank discussion was held for the purpose of airing grievances about the pay scale for firemen. The firemen, including Bickel, were already upset about not having received a salary increase, and complaints and criticisms at the meeting were expected. Bickel, 632 F.2d 1256-57.

The Bickel decision, like the remainder of the cases cited by

petitioner, is factually distinguishable from, and completely consistent with, the decision in the present case. In fact, the Bickel court, like the Illinois Appellate Court, stressed the critical need for operational efficiency and harmony among co-workers in the "high stakes" profession of fire fighting. Bickel, 632 F.2d at 1257.

Mr. Norton's choice of Ferrara as the model case is also telling. In denying relief to Mr. Ferrara, the court noted:

> We . . . do not doubt Ferrara's sincere interest in and commitment to quality public education. We hold merely that a public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run.

Ferrara, 781 F.2d at 1516. Similarly, respondents do not doubt Mr. Norton's commitment to quality fire protection. Respondents suggest, however, that he

should not be allowed to transform his personal grievances into matters of public concern by invoking a supposed popular interest in the way the fire department is run.

b. The "Balancing" Test

Pickering made clear that the task of courts confronted by cases like the present one is to seek a balance between the freedom of the employee, as a citizen, in commenting upon matters which conceivably could be of public concern and the interest of the municipality, as an employer, in promoting the efficiency of the public services it performs. Pickering, 391 U.S. at 568. In Germann v. City of Kansas City, 776 F.2d 761 (8th Cir. 1985), cert. denied, 479 U.S. 813, the court described the Pickering analysis as follows:

> In applying the Pickering balance, courts should

> consider the following factors: (1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and coworkers when the speech in question has caused or could cause the relationship to deteriorate; (3) the time, manner and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.

Germann, 776 F.2d at 764.

The Germann case is evidence that other courts nave not hesitated to affirm discipline applied against public employees who confront their superiors even in the face of First Amendment claims by the employees. In Germann, a Kansas City fireman had written a critical letter to the Fire Chief in which he claimed that the Fire Chief had a "pitifully twisted outlook toward the employees of the Department." The court of appeals held

that the district court properly ruled against the fireman's claim that the Fire Chief's subsequent failure to promote him violated his First Amendment rights. The court noted that after receipt of the letter, the Chief "understandably felt personally insulted and reasonably questioned Appellant's loyalty and respect for him as Fire Chief and whether Appellant would promote and implement department policy." Germann, 776 F.2d at 764-65.

Likewise, even if Mr. Norton's speech touched upon a matter of public concern, his claim that the third amended complaint stated a section 1983 claim for violation of his First Amendment rights was properly rejected. First, the criticism in the July 2, 1984, memo was directed solely at the Fire Chief. In a small suburban fire department like Western Springs, it is apparent that Mr. Norton would have to

work closely with the Fire Chief. His sarcastic remark would certainly make cooperation difficult or impossible. Mr. Norton's reasons for enclosing the phrase "Chain of Command" in quotation marks and including the final sentence ("I can only guess that he couldn't answer unless it went through the 'Chain of Command'") were clearly to call attention to Mr. Norton's sarcastic criticism of his superior officer, to embarrass the Chief, and to undermine his authority. No other possible reason could exist for directing a remark to the Department's officer corps regarding the Fire Chief's ability to respond to criticism.

The January 7, 1985, memorandum was even more outrageous. Mr. Norton accused the two top officers in the Department of "suckering" him into an "insincere ploy" and making him a party to a "deceitful" communication. He suggested that his

superior officers were naive, stupid or ill-advised. These charges are obviously highly disruptive of the Department's morale and ability to operate efficiently.

Significantly, a "fire department, like a police department, has a greater than normal government interest in maintaining morale and discipline." Hughes v. Whitmer, 714 F.2d 1407, 1419 (8th Cir. 1983), cert. denied, 465 U.S. 1023. As the Illinois Appellate Court correctly stated, even if some limited public interest is involved here, this "does not require that the municipality tolerate action which it reasonably believed would disrupt its operations, undermine the authority of its Fire Chief and destroy working relationships within the Department." (App., p. 16a.)

Despite petitioner's claim that the Pickering analysis is solely a question of fact (Pet. for Cert., p. 29), the

established caselaw provides for the resolution of these questions by the court, as a matter of law. Hall, 856. F.2d at 261. In balancing the employer's interests against those of the employee, the court must obviously review the factual record and make its decision therefrom.

Although the reviewing court cannot engage in "unadorned speculation" in determining the impact of speech upon a government agency's ability to function efficiently, nothing under Connick or Pickering forbids the court from drawing reasonable inferences of harm from the employee's speech, his position and his working relationship with his superiors. Hall, 856 F.2d at 261. Connick provides that the employer need not allow events to unfold to the extent that the office is disrupted and working relationships are destroyed before taking action. Connick,

461 U.S. at 152. "Just as the employer may be permitted to infer these untoward consequences from the content, manner, time and place of the employee's speech, so may [the reviewing court]." Hall, 856 F.2d at 261.

IV. CONCLUSION

Mr. Norton fails to demonstrate that the Illinois Appellate Court's opinion is in conflict with a decision of this Court or any other federal court of appeals. Neither does his petition present any other special and important reasons for granting his writ.

For the foregoing reasons, respondents request that Mr. Norton's petition for writ of certiorari to the Illinois Appellate Court be denied.

Dated: May 29, 1990

Respectfully submitted,

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